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5 ANDREW THOMAS UPTON,

No. C 06-07854 WHA

6 Petitioner,

7 v.

8 MIKE KNOWLES, Warden,

9 Respondent.

10  
11 **ORDER DENYING PETITION  
12 FOR WRIT OF HABEAS CORPUS**

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14 /  
15 **INTRODUCTION**

16 Petitioner Andrew Thomas Upton seeks federal habeas relief pursuant to 28 U.S.C.  
17 2254. Petitioner was convicted of four counts of child molestation under California law.  
18 The state trial court sentenced him to six years in prison on June 6, 2003. Petitioner contends  
19 that his trial lawyer rendered ineffective assistance. This order rejects petitioner's claims on the  
20 grounds that he failed to show prejudice due to trial counsel's actions. His petition is **DENIED**.

21 **STATEMENT**

22 **1. THE ALLEGED ACTS OF MOLESTATION.**

23 The jury was asked to decide whether or not petitioner committed lewd and lascivious  
24 acts on his stepdaughter, M.U. At trial, M.U., her mother Jessica, and her aunt Anna Martinez,  
25 testified. Jessica married petitioner on July 1, 2000 and moved into his apartment with her  
26 two daughters, one of whom was ten-year old M.U. They later moved into a home in Tracy,  
27 California (Exh. 4B at 76–79). Jessica left petitioner after a year and three months of marriage  
28 (*id.* at 79).

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1       Ms. Martinez took care of M.U. and her sister in early March of 2002. Ms. Martinez  
2 told the girls about an article she was reading in *Newsweek* regarding molestations by priests.  
3 M.U. seemed to “have more of a particular interest in the article” (*id.* at 54–55). The next day,  
4 on March 4, 2007, when Jessica picked up her daughters, M.U. asked if she could have a  
5 boyfriend and start wearing makeup. Jessica said no and M.U. began to cry, seemingly about  
6 “just teenage, teenage girl stuff.” Later that day, Jessica found M.U. crying and curled up in a  
7 fetal position in the corner of a room. Jessica felt that something else was bothering M.U.  
8 besides the boyfriend and makeup issue (*id.* at 83–85).

9       Jessica spent the next two hours trying to find out why M.U. was so upset. She asked  
10 her daughter if anything had happened to her, and M.U. answered yes. Jessica suspected that  
11 somebody had inappropriately touched her, so she began asking M.U. if any individual family  
12 members had done something to her. Jessica named at least five people before she reached  
13 petitioner’s name. When Jessica asked M.U. whether petitioner did anything to her, M.U.  
14 paused and said yes. Jessica then asked if petitioner had touched M.U., and M.U. answered in  
15 the affirmative. Jessica told Ms. Martinez, who then called 9-1-1 (*id.* at 85–89).

16       On the day M.U. was scheduled to testify, she ran away in the morning and was gone for  
17 twenty minutes before her mother found her (*id.* at 88–89). At trial, M.U. testified about being  
18 molested by petitioner. She was thirteen at the time of trial. She recalled petitioner touching  
19 her “in a bad way” about ten or eleven times over the course of a few months (*id.* at 71–73).  
20 M.U. testified about four specific instances of molestation. When she was ten or eleven years  
21 old, she and her sister were sleeping on the living room floor in their home in San Jose.  
22 Petitioner touched her chest and her vagina under and over her clothing. M.U. moved around  
23 and pretended to wake up. Petitioner restrained her and continued touching her. She was too  
24 frightened to fight back. She did not tell anyone else what had happened; she feared that  
25 “they would confront him and that he would be abusive to them.” M.U. recalled that the  
26 “bad touching” occurred more than five times in the living room (*id.* at 113–20).

27       The molestations also occurred in the master bedroom. M.U. slept between her mother  
28 and petitioner in the bed. M.U. tried to keep her mother awake because she was afraid that

1 petitioner would start touching her again. But petitioner told her to be quiet, go to sleep, and  
2 not wake her mother up. M.U. appeared to go to sleep. Petitioner began touching her chest  
3 under her clothes. M.U. tried to move closer to her mother and, perhaps, because he thought  
4 that “[M.U.] was going to wake up pretty soon,” petitioner fell asleep shortly thereafter. M.U.  
5 did not tell her mother what happened the next day because she was afraid of petitioner’s  
6 temper. Even though petitioner had never struck her or her mother, M.U. recalled an incident  
7 where petitioner hit her sister after her sister accidentally poked him in the eye (*id.* at 121–25).

8 On another occasion, when M.U.’s mother was at work, she and her sister lay in bed  
9 together. Petitioner had been playing video games in the next room. After M.U. heard the  
10 shooting noises from the video game cease, petitioner came into the bedroom and lay down next  
11 to her. He took her hand and placed it on his penis. M.U. said nothing and kept her eyes  
12 closed. She was frightened “that if [she] moved then he would notice.” She did not recall why  
13 he stopped (*id.* at 125–27).

14 The final specific incident M.U. described was when she, her sister, and petitioner sat on  
15 the couch in the living room watching “The Exorcist.” During the movie, petitioner pulled her  
16 legs onto his lap. He then lifted up M.U.’s shirt, dimmed the lights, and touched her chest.  
17 M.U. was scared of the movie and what was going on, so she said nothing. She wiggled around  
18 to let petitioner know that she was awake (*id.* at 128–31).

19 M.U. explained that she finally decided to tell her mother because, “having like  
20 something that big in the back of my mind, [I] just didn’t want it to be there anymore.”  
21 The *Newsweek* article had inspired her to tell her mother because she read about a teenage boy  
22 who “had gone through the same thing, and he never told anybody. And it was forever, and,  
23 like in the back of his mind or something” (*id.* at 136–37).

24 During cross-examination, defense counsel emphasized that, during each of the four  
25 aforementioned incidents, there was always somebody else present (*id.* at 138–139).  
26 Also, defense counsel brought up the fact that M.U. occasionally play-wrestled with petitioner.  
27 M.U. said that petitioner “would pick the play fights with [her and her sister] . . . and then  
28 [they would] wrestle him” (*id.* at 147).

1        After Jessica told M.U. that she and petitioner were going to get a divorce, M.U. wrote  
2 petitioner a series of letters when she was about eleven years old. In one letter, M.U. said,  
3 “I really wanted to spend more time together as a family.” In addition, she wrote, “But it was  
4 always phone calls, business, eating too much salsa. And not eating dinner with us.  
5 Doing things on the computer, going fishing, fighting with mom.” She signed the letter,  
6 “love” (*i.d.* at 151–55). In another letter, M.U. said that her mother still wanted to “work it  
7 out.” She asked whether “another girl” was involved. M.U. then indicated, “We will probably  
8 never see you again, ever. I hope you know what you’re doing.” Defense counsel also showed  
9 another letter where M.U. asked petitioner if he would miss them and whether he liked her art.  
10 She then wrote, “I guess not, because even though you said you liked them, you lied . . .  
11 You lied about your marriage, now you lied, lied about everything.” In her last letter to  
12 petitioner, M.U. wrote, “I hope the next woman you fall in love with doesn’t have kids, because  
13 you don’t know what you put us through” (Exh. 4C at 163–66).

14        On redirect, when the prosecution asked her about those letters, M.U. explained, “I was  
15 young back then and I didn’t really understand a lot, a lot of things. And right now is, I mean,  
16 all I looked up to him for was like a father figure, and that’s all what I wanted him to stick  
17 around for, whether he did that to me or not, but that was a long time ago. I don’t think that  
18 anymore. I’m more, I understand myself better” (*id.* at 174).

19        **2. THE COMPUTER EVIDENCE INTRODUCED AT TRIAL.**

20        To reinforce the requisite criminal intent, the prosecution selected 25–30 images of child  
21 pornography acquired by petitioner, some of which were obtained from a CD-ROM given to the  
22 investigating officer by petitioner’s wife and some of which were obtained from petitioner’s  
23 computer. The prosecution selected photographs depicting children who were approximately  
24 the same age as M.U. (Exh. 4A at 32–33).

25        Defense counsel argued against admitting evidence of child pornography. He argued  
26 that the child pornography had merely been part of alleged mass downloads and did not  
27 necessarily prove that petitioner had seen or was sexually interested in underage children.  
28 This evidence, therefore, allegedly had little probative value but would, instead, consume a

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1 great deal of time and create a highly prejudicial impact upon the jury (*id.* at 22–23, 27–32).  
2 The trial court ruled that the evidence was admissible (*id.* at 35).

3 Officer Kevin Fagalde of the San Jose Police Department testified on behalf of the  
4 prosecution as an expert in computer forensics and replication of data. He had spent over  
5 five hundred hours preparing for trial. He testified about pornographic images found on the  
6 computers seized from petitioner's home. He explained that if a file were never accessed,  
7 the file-creation date and the file-access date should be identical. In this case, the access dates  
8 differed from the creation dates for most of the photos submitted into evidence, indicating that  
9 petitioner had in fact looked at them (Exh. 4C at 177–238). “Newsgroups” were websites  
10 similar to bulletin boards where individuals could post files and comments and download items  
11 onto their computer (*id.* at 193). Officer Fagalde testified that there were some photos  
12 downloaded from the following newsgroups: alt.binary.nospam.teenfem and  
13 alt.binary.nospam.teenfem.repost. The site alt.binary.picture.erotic.pre-teen showed that it had  
14 been picked by a user but no files had been downloaded from it (*id.* at 199–201). The officer  
15 also located the following sites on a Dell laptop found in petitioner's home and accessed by  
16 “A. Upton”: RealTeenagerSex.Com, LiveAmateurTeenSex.Com, TooYoungGirls,  
17 NextDoorTeen.Com, and LiveAmateurTeenSex.Com. Then somebody logged onto that same  
18 laptop as the administrator and accessed these sites: LolitaSites, LolitaDashSites.com,  
19 LolitaTeen.Com, LolitaTeenDashDreamer.Net, TeenGirlSex.Net, and JapanTeens.Com  
20 (*id.* at 234–36).

21 Defense counsel did not retain his own expert witness. He called petitioner instead.  
22 Petitioner had obtained a degree in electronic engineering. He started as a field service engineer  
23 working on the semiconductor equipment at K.L.A.-Tencor. After three years, he was  
24 transferred to the training department to teach networking. After another three years, he  
25 became the software manager for the training department (Exh. 4D at 309). During his trial,  
26 petitioner was a consultant for a semiconductor manufacturing company and owned seven or  
27 eight computers (Exh. 4D at 309–10). Petitioner, however, did not know any specifics about  
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1 Encase, the computer program used by Officer Fagalde to recover erased files from computers  
2 (Exh. 4E at 385).

3 Petitioner admitted that he would download adult pornography to his desktop in mass  
4 downloads from various newsgroups. Whenever he discovered some child pornography that  
5 others inserted into the bulk download, he claimed he would delete the photos. “And if there  
6 were too many, [he] would wipe the whole directory out” (Exh.4D at 315–18).  
7 Petitioner explained that thousands of these files could be downloaded without his ever viewing  
8 them (*id.* at 325).

9 The defense then demonstrated for the jury on a computer in the courtroom how  
10 newsgroups were accessed and downloaded and how files were accessed and deleted.  
11 Petitioner also testified that the day before, he and defense counsel obtained access to Encase,  
12 the prosecution’s program designed to preview and recover both deleted and undeleted files  
13 from the hard drive. Petitioner had the person at the computer keyboard go to certain  
14 directories to systematically recover each of the images introduced by the prosecution.  
15 Petitioner then explained to the jury that these images had been deleted by him earlier and that  
16 there was no way to ascertain whether those files had ever been viewed (*id.* at 324–54).  
17 Petitioner also testified that some of his friends, who collected adult pornography, came to his  
18 house and surfed the Internet (*id.* at 314).

19 During his cross-examination, petitioner confirmed that he had visited sites such as:  
20 RealTeenagerSet.com, LiveAmateurTeenSex.com, CyberAge.com,  
21 ParticipatingYoungGirls.com, RealTeenageAreaSex.com, NextDoorTeen.com, and  
22 LiveAmateurTeen.com. When asked whether he “chose to visit sites with names that  
23 suggested they involved children,” petitioner responded, “Not necessarily visit sites.”  
24 When asked again whether he chose to go to those sites, he answered, “I did not go inside  
25 those sites, no, I did not as in I did not pay for it, no” (Exh. 4E at 390–92). Petitioner explained  
26 that a site that advertised as a teen site was not necessarily a teen site and could have adult  
27 models (*id.* at 411).  
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1        In his closing arguments, the prosecutor concentrated on M.U. and her relatives'  
2 testimonies (Exh. 4F at 427–50). The prosecutor also explained to the jury the purpose of  
3 introducing the child pornography and erotica into evidence. It was brought forth "to show you  
4 that the defendant likes young-looking girls or women who look young and that he is highly  
5 sexually stimulated with all the pornography he looks at constantly every day. It goes to his  
6 intent. It goes to his lack of mistake. He didn't accidentally touch her and there was no  
7 testimony he accidentally did anything" (*id.* at 432). The prosecution also argued, "The  
8 defense, their expert is the defendant. Does anybody see a problem with that? Does he have a  
9 motive to lie in this case? Absolutely. He has no experience with Encase, the computer  
10 program we talked about. No experience whatsoever, and he is giving you opinions about what  
11 Encase, what it does and what it doesn't do. He has no experience conducting forensic  
12 examinations" (*id.* at 451–52).

13       During closing arguments for the defense, counsel said that he "was going to call an  
14 expert witness" but he "got everything [he] needed out of the prosecution expert that [the  
15 defense expert] was going to testify to. It had to do with how this stuff appears on the web."  
16 Defense counsel pointed out that Officer Fagalde "never testified that any of the files were  
17 viewed . . . , [t]he reason being access date does not mean viewed" (*id.* at 465–65). He then  
18 argued that M.U. was angry at rather than afraid of petitioner, given the content of the letters  
19 she sent petitioner after her mother left him (*id.* at 479–85).

20       The jury in the Santa Clara County Superior Court found petitioner guilty of four counts  
21 of lewd and lascivious acts on a child under fourteen. On June 6, 2003, the trial court sentenced  
22 him to six years in prison. Petitioner filed a timely appeal in the California Court of Appeal,  
23 which affirmed the trial court's decision. Petitioner then filed and was subsequently denied a  
24 petition for writ of habeas corpus in the Santa Clara County Superior Court. Petitioner filed the  
25 same petition in the California Court of Appeal and in the California Supreme Court.  
26 Both courts denied the petition on the merits. On December 22, 2006, petitioner filed a pro se  
27 federal habeas corpus petition pursuant to 28 U.S.C. 2254. On May 29, 2007, this Court  
28 appointed counsel.

1           **3. PROCESS OF SEEKING HABEAS RELIEF.**

2           The petitioner seeks habeas relief on grounds of ineffective assistance of counsel at trial.  
3 He claimed that his trial counsel was ineffective in (1) failing to prepare, retain and call an  
4 expert witness to challenge the prosecution's computer expert; and (2) coercing petitioner to  
5 testify as his own 'expert' witness after counsel failed to deliver on the latter's promise to retain  
6 an independent expert (Pet. Response to Ct. Request for State Court Proceedings at 3).

7           Petitioner retained Attorney Patrick Clancy as trial counsel. According to petitioner,  
8 Attorney Clancy originally stated that he routinely worked with a "stable" of defense experts  
9 and that his \$75,000 fee would include the retention, preparation, and testimony of expert  
10 witnesses as it became necessary. After the trial began and Officer Fagalde had already testified,  
11 Attorney Clancy conferred with Jon Berryhill, a forensic specialist. Attorney Clancy, however,  
12 did not actually retain Mr. Berryhill to rebut the prosecution's expert testimony.  
13 Rather, Attorney Clancy decided to call petitioner himself to rebut Officer Fagalde's testimony.  
14 Petitioner states that he repeatedly expressed his reluctance to Attorney Clancy to take the stand  
15 in his own defense. According to petitioner, Attorney Clancy said that it was now "too late" to  
16 hire an independent defense expert and, unless petitioner took the stand, the jury would be left  
17 without a rebuttal to Officer Fagalde's testimony (Trav. Pts. & Auth. at 5-7). Finally, "[t]hough  
18 Petitioner did not want to testify, he had no rational basis to oppose what appeared to be a  
19 professional competent opinion, rendered from years of experience. He eventually caved in to  
20 Attorney Clancy's demands and resignedly took the stand, violated his right against  
21 self-incrimination, [and] regrettably, was convicted" (Pet. at 43).

22           When petitioner filed state habeas petitions, he included the following exhibits:  
23 a transcript of the testimony of Officer Fagalde, a declaration from computer forensics expert  
24 Ron Short, a declaration from Mr. Berryhill, and a copy of Attorney Clancy's website.  
25 Mr. Short's declaration was one page in length. Besides qualifying himself as a computer  
26 forensic expert, the remainder of the declaration stated that "it is certainly possible to  
27 unintentionally download certain data elements that the user would otherwise have avoided, had  
28 each data element been individually reviewed prior to the download process." Mr. Berryhill's

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1 declaration was even shorter. After he qualified himself as the manager and Chief Operating  
2 Officer of Berryhill Computer Forensics, LLC, Mr. Berryhill stated that he was contacted  
3 around April 3, 2003, by Attorney Clancy. He “spent approximately two hours working with  
4 [Attorney Clancy] to recover the information he sought” and, “to [his] recollection, this was the  
5 only time [Mr. Berryhill] was contacted by Attorney Clancy” (Berryhill Decl. at 1).  
6 Petitioner’s state habeas petitions requested “an order for the taking of such evidence as may be  
7 necessary for the proper consideration of this petition” (Superior Ct. Pet. at 10, Ct. of Appeal  
8 Pet. At 11, Cal. Supreme Ct. Pet. at 10). The state petitions were denied, however, without any  
9 evidentiary hearing ever being conducted.

10 In support of his federal habeas petition, petitioner obtained a longer and more detailed  
11 sworn declaration from Mr. Berryhill. Mr. Berryhill stated that he “was contacted by the  
12 original trial counsel, Attorney Clancy, prior to the trial to provide computer forensic support.  
13 [Mr. Berryhill] offered both [his] professional services and the use of [his] lab to allow the  
14 examination of computer evidence. Attorney Clancy declined [Mr. Berryhill’s] offer of  
15 analysis and/or testimony and chose to conduct the analysis himself. Accordingly, [Mr.  
16 Berryhill] provided no input to his analysis or conclusions” (Berryhill Decl. at 3).

17 Mr. Berryhill read the transcript of Officer Fagalde’s testimony at this point.  
18 Mr. Berryhill made the following main conclusions in his federal declaration in support of the  
19 traverse: (1) it was unclear whether or not the images depicting child pornography were deleted  
20 by the user subsequent to their download; (2) differences between the file-access date and  
21 file-creation date did not necessarily mean that the image was intentionally saved and viewed  
22 by the user because it could also mean that there was “a simple delay in the time when the  
23 image was downloaded and when it was first viewed and then deleted”; (3) the government  
24 expert failed to discuss other important factors necessary in determining whether the computer  
25 user intended to view child pornography (*e.g.*, website names, newsgroup names, search terms,  
26 type of images, when they were obtained, their source, their destination on the user’s computer,  
27 the length of time the images were in the active space, what else was downloaded around the  
28 same time, what else was deleted around the time, what had been saved and how the material

1 was organized); (4) because there is so much sexually explicit material available on the Internet  
2 from free and paid sources, a large portion of it may not necessarily conform to its purported  
3 category; (5) it is common to download a newsgroup list that includes tens of thousands of  
4 group names, which cannot all be read by the user; (6) it is possible for a user to subscribe to  
5 “sites with teen-type names knowing that the material there is almost always legal, adult  
6 pornography using adult models”; (7) the act of subscribing to or “opting into” a newsgroup can  
7 be merely a selection that makes it easier for the user to download future updates; and (8) many  
8 adult sites contain pop-ups that cause many other windows and web sites to pop up without  
9 specific user action” (Berryhill Decl. at ¶¶ 7–17).

Petitioner also obtained a declaration from the trial judge, William Danser.<sup>1</sup>

Petitioner’s previous post-conviction attorney wrote in an email to someone named Amy, “I went to visit Judge Danser today and spoke with him at length about [Mr. Upton’s] case.<sup>2</sup> It was most encouraging. He told me, and this is practically verbatim: ‘This is one of the only cases I have ever seen where I would hold the defense attorney completely responsible for the outcome. He lost sight of important issues in favor of impressing everyone with his computer skills and knowledge. It was a disaster, and I think that but for the lawyer, Mr. Upton would be enjoying his freedom.’” This email purporting to express former Judge Danser’s thoughts on the matter was forwarded to Danser. After reading this email, Danser stated in his declaration “that the evidence apart from the computer evidence did not seem to compel a conviction; and that the defense attorney seemed overly enamored with his own computer skills over and above what could be obtained from forensic experts in the field.” He also opined that, “as a general principle, it is counterproductive” for an attorney to put his own client on as an expert (Danser Decl. at 12). Danser, however, explicitly stated that he did *not* say, “This is one of the only cases I have ever seen where I would hold the defense attorney completely responsible for

<sup>1</sup> In 2004, former Santa Clara County Superior Judge William Danser was convicted of eight misdemeanors. The following year, the California Commission of Judicial Performance censured him for willful misconduct. In 2006, he was convicted of a felony for fixing parking tickets for his friends and members of the San Jose Sharks and Earthquakes.

<sup>2</sup> Information regarding the attorney's email to came from former Judge Danser's declaration. "Amy" was never identified beyond being the recipient of counsel's email.

1 the outcome.” Danser also denied saying, “[B]ut for the lawyer, Mr. Upton would be enjoying  
2 his freedom” (Danser Decl. at 13).

3 Attorney Clancy has not made a declaration to date.

4 **ANALYSIS**

5 Petitioner contends that trial counsel was ineffective on two grounds. *First*, trial counsel  
6 failed to call an expert in computer forensics to rebut the testimony of the state’s expert  
7 (Trav. Pts. & Auth. at 12). *Second*, trial counsel enlisted an unwilling petitioner as the  
8 defense’s forensic expert and thereby compromised petitioner’s Fifth Amendment right to  
9 decline to testify (*id.* at 23). Respondents claim that the new factual allegations submitted with  
10 the traverse were never presented to state court and thus rendered petitioner’s claim of  
11 ineffective assistance of counsel unexhausted. This order agrees with respondents, finding that  
12 petitioner’s claims are unexhausted because he never presented the new declarations of Mr.  
13 Berryhill and former Judge Danser in his state habeas petitions. But even taking these new  
14 declarations into account, petitioner’s request must be **DENIED** because he has failed to show  
15 prejudice.

16 **1. EXHAUSTION OF STATE REMEDIES.**

17 According to 28 U.S.C. 2254, habeas relief may be granted if the state adjudication  
18 “resulted in a decision that was contrary to, or involved an unreasonable application of the facts  
19 in light of the evidence presented in the State court proceeding.” Here, the state court decision  
20 did not result in a decision that was contrary to, or involved an unreasonable application of the  
21 evidence presented in the state court proceeding; Mr. Berryhill and former Judge Danser’s  
22 declarations were never presented until petitioner sought habeas relief in the federal courts.

23 In order to properly exhaust state remedies, the specific factual basis of the federal  
24 claim also must be presented to the highest state court. See *Kelly v. Small*, 315 F.3d 1063,  
25 1067–69 (9th Cir. 2003) (finding unexhausted ineffective assistance of counsel and  
26 prosecutorial-misconduct claims where specific instances of ineffectiveness and misconduct  
27 asserted in federal petition were neither in the California Supreme Court petition nor discussed  
28 by the court of appeal) (overruled on other grounds). See also *Gray v. Netherland*, 518 U.S.

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1 152, 162–63 (1996) (“[F]or purposes of exhausting state remedies, a claim for relief in habeas  
2 corpus must include reference to a specific federal constitutional guarantee, as well as a  
3 statement of the facts that entitle the petitioner to relief”).

4 New factual allegations will render a claim unexhausted if they “fundamentally alter the  
5 legal claim already considered by the state courts.” *Vasquez v. Hillery*, 474 U.S. 254, 260  
6 (1986). “In habeas proceedings, the federal courts are not free to entertain new evidence that  
7 places the claim in a significantly different posture, when that evidence was never presented to  
8 the state courts.” *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988). “A petitioner does not  
9 satisfy the exhaustion requirement by presenting the state courts only with the facts necessary to  
10 state a claim for relief.” *Gray*, 518 U.S. at 153. If available state remedies have not been  
11 exhausted as to all claims, the district court must dismiss the petition. *See Guizar v. Estelle*,  
12 843 F.2d 371, 372 (9th Cir. 1988).

13 In *Aiken v. Spalding*, 841 F.2d 881 (9th Cir. 1988), the petitioner sought habeas relief  
14 from his first-degree murder conviction. Petitioner’s initial interrogation by police had been  
15 tape-recorded, unbeknownst to both parties. At a supplemental hearing following a remand  
16 from the state supreme court, the officers testified that they did not hear petitioner’s request for  
17 an attorney or his wish to stop the interrogation. In his federal habeas petition, the petitioner  
18 presented new evidence that was “material to the issue of whether the interrogating officers  
19 heard and ignored [petitioner’s] requests for counsel and for the interrogation to cease.” *Id.* at  
20 882. This evidence consisted of decibel-level studies by an expert who had examined the  
21 original tape recordings using modern sound equipment. The Ninth Circuit stated that the  
22 expert’s “affidavit substantially improves the evidentiary basis for [petitioner’s] right-to-  
23 counsel and voluntariness arguments, thereby presenting the very type of evidence which the  
24 state should consider in the first instance.” *Id.* at 883–84. The Ninth Circuit dismissed the  
25 habeas petition without prejudice for failure to exhaust state remedies.

26 The Court finds that the facts in this case are similar to that in *Aiken*. Petitioner had  
27 been convicted of child molestation on the basis of testimony by M.U., Jessica, Ms. Martinez,  
28 and Officer Fagalde. The prosecution presented images of child pornography allegedly found

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1 on petitioner's computer to help prove that petitioner had the requisite criminal intent when he  
2 touched M.U. The state court record prior to petitioner's filing of the federal habeas petition  
3 did not contain any evidence as to what a computer expert would have said had one been  
4 retained to testify on behalf of the defense. The state court held, "Petitioner has failed to show  
5 that hiring a computer expert would have provided any helpful testimony. Petitioner has  
6 provided a declaration by a Ron Short, who states that the pornographic pictures of teenage girls  
7 that were found on petitioner's computer could have been downloaded unintentionally.  
8 However, Mr. Short's statements still do not controvert the testimony at trial that petitioner had  
9 signed up for sites such as RealTeenagerSex.com and LolitaTeen.com" (Pet. Exh. E at 158).  
10 The state court also found that petitioner's "assertion that he was coerced into testifying against  
11 his will is not supported by any persuasive evidence aside from his own self-serving  
12 statements" (*id.* at 159). Petitioner asked for and was denied an evidentiary hearing in state  
13 court on the basis of that record.

14 In his federal habeas petition, petitioner filed new declarations from a computer expert  
15 and the state court judge who had presided over his trial. This evidence was material to the  
16 issue of whether or not Mr. Clancy's representation was reasonable and prejudiced petitioner.  
17 Mr. Berryhill specialized in collecting, preserving, analyzing, and presenting computer-related  
18 evidence. In his declaration, Mr. Berryhill made various points in response to Officer Fagalde's  
19 testimony — *e.g.*, it was unclear whether or not the illicit images were deleted by the user  
20 subsequent to their download, and differences between a file-access date and file-creation date  
21 did not necessarily mean that the image had been intentionally saved and viewed by the user.  
22 Former Judge Danser stated in his declaration "that the evidence apart from the computer  
23 evidence did not seem to compel a conviction; and that the defense attorney seemed overly  
24 enamored with his own computer skills over and above what could be obtained from forensic  
25 experts in the field." These declarations — particularly Mr. Berryhill's — substantially  
26 improved the evidentiary basis for petitioner's ineffectiveness-of-counsel arguments, thereby  
27 presenting the very type of evidence that the state should have considered in the first instance.  
28

1        Although this order finds that the declarations by Mr. Berryhill and former Judge Danser  
2 substantially improved the evidentiary basis for petitioner's claims, it is not saying that the  
3 evidence has improved petitioner's case to the point where, but for Mr. Clancy's alleged  
4 mistakes, there was a reasonable probability that the result of the trial would have been  
5 different.

6            **2. INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIMS.**

7        In the alternative, even if the new declarations were admissible, habeas relief should  
8 still be denied on the merits. An application for a writ of habeas corpus may be denied on  
9 the merits, notwithstanding the failure of the applicant to exhaust the remedies available  
10 in the courts of the state. 28 U.S.C. 2254(b)(2). Petitioner presented his  
11 ineffective-assistance-of-counsel claims to the state court of appeal and to the California  
12 Supreme Court in his habeas petition. Under the Antiterrorism and Effective Death Penalty  
13 Act, habeas relief can be granted only if the state court decision is "contrary to, or involved  
14 an unreasonable application of, clearly established Federal law, as determined by the  
15 Supreme Court of the United States." 28 U.S.C. 2254(d). *Strickland v. Washington*, 466 U.S.  
16 668 (1984), is considered by the Ninth Circuit to be clearly established federal law for  
17 analyzing ineffective assistance of counsel claims. *Wilson v. Henry*, 185 F.3d 986, 988 (9th Cir.  
18 1999).

19        *Strickland* sets forth a two-step standard that must be satisfied in order to prove  
20 ineffective assistance of counsel. *Strickland*, 466 U.S. at 687-88. *First*, petitioner must show  
21 that counsel's representation fell below an objective standard of reasonableness (*id.* at 668).  
22 The question is not what counsel could have done but whether the choices made by counsel  
23 were reasonable. *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny  
24 of counsel's performance must be highly deferential, and a court must strongly presume that  
25 counsel's actions falls within the wide range of reasonable assistance. *Strickland*, 466 U.S.  
26 at 688.

27        *Second*, petitioner must show that counsel's performance prejudiced petitioner and  
28 deprived petitioner of a fair trial and reliable results. The petitioner must prove that, but for

1 counsel's errors, there is a reasonable probability that the result of the proceeding would have  
2 been different (*id.* at 694). If the state's case is weak, there is a greater likelihood of a  
3 reasonable probability that the trial would have been different. *Johnson v. Baldwin*, 114 F.3d  
4 835, 839–40 (9th Cir. 1997).

5           **A.       Were Trial Counsel's Actions Reasonable?**

6           With the current record, it is unclear whether the choices made by defense counsel not  
7 to retain an expert witness and to advise petitioner to testify were reasonable. On the one hand,  
8 Attorney Clancy conferred with Mr. Berryhill *after* trial had begun and the prosecution's  
9 expert witness had already testified. Trial counsel then spent only two hours working with  
10 Mr. Berryhill trying to recover information from computers provided by the District Attorney.  
11 On the other hand, it may not have been entirely unreasonable that lay jurors could make  
12 reasoned judgments after hearing Officer Fagalde's testimony on computer files and the  
13 defense's perspective on what the computer evidence actually represented. Defense counsel  
14 also demonstrated for the jury on a computer in the courtroom how newsgroups were accessed  
15 and downloaded and how files were accessed and deleted. Without further information, the  
16 Court cannot judge the reasonableness of Attorney Clancy's decision to not hire an expert and  
17 to put petitioner on the stand. The reasonableness issue does not need to be addressed,  
18 however, because petitioner failed to show that he was prejudiced by Attorney Clancy's actions,  
19 as discussed below.

20           **B.       No Prejudice Due to Trial Counsel's Actions.**

21           The second prong of the *Strickland* test asks whether, but for trial counsel's errors,  
22 there was a reasonable probability that the result of the proceeding would have been different.  
23 Here, the answer is no.

24           First and foremost, petitioner has not shown that his conviction hinged on the computer  
25 evidence and his taking the stand. As this case was a child-molestation case, the testimony of  
26 the child victim held great weight. *See Bruce v. Terhune*, 376 F.3d 950, 957–58 (holding that a  
27 case involving a credibility contest and the child victim's account was not inherently  
28 implausible); *People of Territory of Guam v. McGravey*, 14 F.3d 1344, 1346–47 (9th Cir.

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1       1994) (upholding conviction for sexual molestation based entirely on the uncorroborated  
2       testimony of the victim). Here, the victim, her mother, and her aunt all testified about the  
3       incidents of molestation. M.U. stated that she had been inappropriately touched ten or eleven  
4       times, and she described four specific incidents that occurred when she was eleven years old or  
5       younger.

6               Nothing in the record indicated that the victim was discredited. Petitioner tried to attack  
7       M.U.'s testimony because the child failed to make any molestation allegations against petitioner  
8       until she learned that petitioner had permanently refused to reconcile with her mother.  
9       This evidence, however, was still consistent with the story of a frightened child victim who  
10      chose not to reveal the crime until weeks, months, or years later. Defense counsel also  
11      attempted to undermine M.U.'s credibility by asking M.U. whether she liked to play-wrestle  
12      with petitioner and by showing the jury her letters to petitioner. Again, it is not uncommon for  
13      a child victim to express conflicting emotions of fear and affection towards her perpetrator.  
14      The Court finds that nothing in the trial record indicated that M.U. was discredited during  
15      cross-examination or closing arguments.

16               **(1)     *No Prejudice for Failing to Hire an Expert.***

17               To support his claim of prejudice with respect to the computer-expert claim, petitioner  
18      introduced declarations from Mr. Berryhill and former Judge Danser, neither of which was  
19      presented to the state courts. Even if petitioner's own expert testimony would have been  
20      devalued to some extent by the jury's viewing him as biased, petitioner has not shown that,  
21      had a computer expert like Mr. Berryhill testified, there would have been a reasonable  
22      probability that he would not have been convicted. *First*, defense counsel had tried but was  
23      unable to keep the computer evidence from being admitted. *Second*, on cross-examination,  
24      Officer Fagalde acknowledged that some improper windows could pop up beyond the user's  
25      control and that it was also possible that child pornography was posted onto adult sites.  
26      *Third*, defense counsel demonstrated to the jury on a computer in the courtroom how  
27      pornographic images could have been unintentionally downloaded onto petitioner's computer.  
28      Mr. Berryhill's declaration shows that defense counsel actually developed upon many of the

same arguments he would have made — *e.g.*, that it was unclear whether or not the illicit images were deleted by petitioner after download and that it was possible to unknowingly obtain these images in the midst of a mass download. *Fourth*, as discussed earlier, there was the impact of M.U.’s testimony to consider. *Fifth*, the Court gives little import to former Judge Danser’s comment “that the evidence apart from the computer evidence did not seem to compel a conviction” as the statement was too conclusory. Moreover, he explicitly denied in his declaration that he had said, “[B]ut for the lawyer, Mr. Upton would be enjoying his freedom.”

**(2) No Prejudice for Testifying on His Own Behalf.**

Petitioner also offers nothing in the record to show prejudice due to his testifying on his own behalf. Defense counsel's advice that a defendant testify at his own prosecution (and therefore expose himself to self-incrimination) is not necessarily deficient. *See, e.g.*, *United States v. Sanchez-Cervantes*, 282 F.3d 664, 672 (9th Cir. 2002) (holding that defense counsel's advice that defendant testify at his prosecution for drug offenses was not deficient and did not result in any prejudice to defendant, as required to establish ineffective assistance of counsel even though this course of action exposed defendant to cross-examination on past drug convictions). The only effect was that his own expert testimony was somewhat devalued but, as discussed earlier, this result was not prejudicial considering the strength of the rest of the case.

19       Here, the state's case was not weak. Even if the prosecutor had not been able to elicit on  
20 cross-examination evidence of the websites petitioner visited, the result of the trial would have  
21 been the same in all likelihood. The inculpatory evidence regarding teenage newsgroups and  
22 websites was introduced by government expert Officer Fagalde on direct-examination.  
23 During cross-examination, the prosecutor asked petitioner about these websites, which had  
24 already been presented before the jury. The prosecutor spent the majority of his closing  
25 argument discussing M.U.'s testimony rather than the computer evidence. In other words,  
26 petitioner's computer activity did and would have come into evidence regardless of whether or  
27 not petitioner took the stand. The evidence was already overwhelming before petitioner took  
28 the stand.

## CONCLUSION

Petitioner's ineffective-assistance-of-counsel claim regarding the failure to hire a computer-expert was not exhausted because of the new declarations filed with his federal habeas. Nonetheless, the Court here reviewed the petition on its merits pursuant to 28 U.S.C. 2254 (b)(2). The Court finds that petitioner did not meet the *Strickland* standard because he failed to show prejudice by trial counsel's conduct. The plaintiff's petition for writ of habeas corpus is **DENIED** with prejudice.

## **IT IS SO ORDERED.**

11 || Dated: October 15, 2007.

Wm. Alsup